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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Robert Reed Rogers, *Petitioner*,
v.
Securities and Exchange Commission, *Respondent*.

On Petition for a Writ of Certiorari From the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Pro Se

44pp

QUESTION PRESENTED

Whether a District Court salary Disgorgement Order, imposed against the Chairman of a company based solely upon an unsigned conclusory hearsay statement of an unfaithful employee/SEC informant previously terminated for embezzlement, regarding the company's "legitimate" business, conflicts with the Eighth Amendment and opinions of the Ninth and other Circuits requiring that a disgorgement order be reasonable and equal to only the proven unjust enrichment flowing from the wrongdoing. Hately v. S.E.C., 8F.3d 653, 656 (9th Cir. 1993).

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I. JURISDICTIONAL STATEMENT

This petition by Robert Reed Rogers ("Rogers") results from the denial of his motion for hearing en banc entered August 18, 2000, [Appendix A] and the opinion and order of the Ninth Circuit May 18, 2000,[Appendix B], which denied Petitioner's appeal from the District Court's post-judgment disgorgement orders of May 18, 1998 [Docket No. 92, Excerpt of Record Document Number 10] ("the May 18 Order"), July 8, 1998 [Docket No. 105, Excerpt of Record Document Number 20] ("the July 8 Order"), and its June 9, 1998 Order refusing to consider Rogers' Motion for Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure [Docket No. 95, Excerpt of Record Document Number 16] ("the June 9 Order").

Petitioner Rogers timely filed his notices of appeal on [July 15, 1998, and July 17, 1998][Docket No. 106-109 Excerpt of Record Document Numbers 22 and 23]. Courts have held that post-judgment orders, such as those regarding disgorgement, are appealable and that the Court of Appeals for the Ninth Circuit had jurisdiction to consider Petitioner's appeal. U.S. v. One 1986 Ford Pickup, 56 F. 3d 1181, 1185 (9th Cir. 1995); U.S. v. State of Washington, 761 F. 2d 1404, 1406 (9th Cir. 1985).

A. The Proceedings Below

On May 18, 1998, the district court entered its order granting in part and denying in part the SEC's motion for disgorgement. Rogers' motion for reconsideration of the May 18 Order was denied by an Order entered June 10, 1998. On July 8, 1998, the district court granted the SEC's motion to amend the May 18 Order. On August 14, 1998, an amended supplemental judgment was entered against Rogers reflecting the disgorgement mandated by the May 18 Order, as amended by the order of July

8. To the extent that appellant should have noticed appeals from the amended supplemental judgment rather than the orders, the notices of appeal were treated by the Appellate Court as filed on the date of the entry of these judgments.

B. The Disgorgement Order

Judgment of permanent injunction and other relief were entered on September 18, 1996, pursuant to offers of consent to judgment by defendant Robert Reed Rogers to the following provisions of the Securities Act: Section 10(b), 15 U.S.C. 78j(b), Section 13(a), 15 U.S.C. 78m(a), Section 13(b)(2)(A), 15 U.S.C. 78m(b)(2)(A), Section 13(b)(2)(B), 15 U.S.C. 78m(b)(2)(B), and Section 13(b)(5), 15 U.S.C. 78m(b)(5). The Judgment provided for payment of disgorgement, including prejudgment interest, in an amount determined by agreement of the parties or by the district court upon motion.

Later, on May 18, 1998, the District Court ordered Rogers to disgorge $174,367 in salary, 30,536,575 shares of Comparator stock, and $4,469.50 in trading profits, and to disavow certain debts owed to him by Comparator. On June 2, 1998, the SEC moved to amend the May 18 Order to add $88,739 more to the amount previously ordered disgorged by Rogers, claiming that the Court had "inadvertently overlooked" this in its original decision. This motion was then granted by order entered July 8, 1998. On June 10, 1998, the district court denied Rogers' motion for reconsideration of the May 18 Order. On July 8, 1998, the district court granted the SEC's motion to amend the May 18 Order to add $88,739 to the amount of Rogers' disgorgement.

The SEC's motion was granted to the extent that the District Court ordered Rogers to disgorge $174,367 in salary as requested by the SEC, 30,536,575 shares of Comparator stock and $4,469.50 in trading profits of an unrelated entity. The

district court denied the Commission request that Rogers disgorge $753,424 of proceeds from the sale of Comparator stock belonging to others. The Court also ordered Rogers to disavow certain expense reimbursement debts owed to him by Comparator.

In granting disgorgement of salary, the district court found that evidence supported the conclusion that "Comparator engaged in no substantial business activities" other than selling stock to investors pursuant to false and misleading offering materials and filings. The Court held that all compensation received by Rogers during the time period alleged by the SEC was "excess" because no legitimate work was performed. Thus, all compensation which "flowed from the wrong" was subject to disgorgement.

C. Factual Background in the Context of the SEC Action

Comparator Systems Corp. ("Comparator") had been operating in the fingerprint identification business for 17 years before Friday, May 3, 1996, when the company's stock opened on the Nasdaq at 6 cents per share shot up to 28 cents with more than 121 million shares changing hands. That was followed on Monday, May 6, with a surge to $1 per share on trading of more than 151 million shares and 177 million shares on Tuesday, May 7, 1996, before closing at 88 cents.

All three days set trading share volume records for the Nasdaq, generating a media frenzy with up-to-the-minute television reports on the financial news networks and daily front page lengthy articles in the Wall Street Journal and USA Today, among others.

Comparator, through its President Richard Floegel, explained the heavy trading activity on the market's anticipation

of a new fingerprinting technology that the company had been developing over the previous eight years, and was widely quoted: "You can come to Atlanta [CardTech/SecurTech Exhibition] and see it. It's there." Los Angeles Times, May 8, 1996, lead article, front page, "Business" Section.

By this date Comparator was thrust into Wall Street record books as having set three consecutive trading-volume records. Over four trading days its stock had gone from 6 cents to almost $2 until trading closed on May 8th at 56 cents a share, before trading was halted by Nasdaq on May 9. Immediately thereafter, the extraordinary trading volume and price fluctuation of Comparator stock which prompted the cessation of trading by Nasdaq led to innumerable investigations, including that by the SEC which, three weeks later, resulted in a Complaint filed May 31, 1996, accompanied by press releases and widespread publicity the following Monday, June 3, 1996.

Comparator and its Chairman, Petitioner Rogers (and two other officers, Scott Hitt and Greg Armijo), were named in the Complaint, which alleged, alternatively, that Comparator had no such fingerprint device product, or, if it did, it had been stolen from scientists at Edinburgh University in Scotland. The Complaint also alleged that Comparator's earlier accounting reports had overstated certain assets, including some patents and the net value of a block of stock Comparator owned in another company. Not long after, Comparator consented to an injunction not to commit fraud and an undertaking to immediately prohibit Petitioner Rogers from acting as an officer or director of Comparator. However, Comparator was allowed to employ him as a consultant to the company for six months after the entry of the Final Judgment.

This consent decree against Comparator, itself, imposed no disgorgement, restitution or other monetary penalty. Comparator then publicly stated that "the deal would allow it

[Comparator] to focus on the pursuit of the rapidly emerging biometric identification market." USA Today, September 20, 1996, front page, "Money" Section.

II. THE REASONS FOR GRANTING THE PETITION

A. The Disgorgment Order Upheld by the Court of Appeals Is Contrary to Law

Petitioner Rogers claimed in his appeal that the lower court unfairly concluded, on the sole basis of a statement from a former discredited employee of Comparator, that the company "engaged in no legitimate business" during the time period set forth in the SEC's complaint, and on that basis wrongfully imposed a salary disgorgement order against him. The offending written statements by one Kay Churchill are set forth in the Excerpts of Record Document Number 2.

Petitioner Rogers claims here as before that the highly prejudicial statements did not meet evidentiary standards and should not have been allowed or considered by the Court. Local Rule 7.5.3 of the Central District of California provides that declarations "shall contain only factual, evidentiary matter" and must comply with Rule 56(e) of the Federal Rules of Civil Procedure which requires, in pertinent part, that:

> "Supporting affidavits...shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Nothing in the excerpt from the Churchill statement submitted by the SEC, and relied upon exclusively by the District Court, confirms that she had either the requisite personal

knowledge or in any way affirmatively demonstrated that she was even competent to testify concerning these matters at trial. Indeed, the statements were insufficient to support even a basic search warrant, but were found by the Court to be sufficient to order salary disgorgement.

By law, the absence of any signature on Ms. Churchill's purported statement precluded the Court and the SEC from claiming that she qualified as an affiant . Blacks Law Dictionary's definition of an affiant : "The person who makes and subscribes an affidavit." Barron's Law Dictionary (2nd Edition) states that an affiant is: "The person who makes and subscribes to a statement made under oath". See also Cord v. Smith, 370 F.2d 418, 420 fn.1 (9th Cir. 1996)

In Lehnert v. Ferris Faculty Association, 556 F. Supp. 309 (W.D. Michigan S.D. 1982), the Court specifically rejected a similar claim that a transcript like Churchill's [Excerpts of Record Document Number 2] could be treated as an affidavit:

> "Although the Federal Rules of Civil Procedure provide for the submission of affidavits on a motion for summary judgment, the rules require that such affidavits be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). The pertinent testimony before the Review Committee was taken without the benefit of cross-examination and largely consisted of objectionable, self-serving, and hearsay testimony. Therefore, I find that the ...transcript does not conform to the requirements of Rule 56(e)." Lehnert, supra, 556 F. Supp at 315

Moreover, the District Court compounded the plain error in not allowing a hearing or requiring oral testimony regarding Comparator's "lack of business activities". Indeed, prior to the entry of the Court's May 18 Order(at the May 11, 1998 hearing), Petitioner Rogers had provided direct contradictory evidence, testifying that Comparator had been engaged in substantial business and had, in fact, developed a proven product:

> "I spent '92' and '93' in Malaysia with our entire engineering staff. We have absolute documentation that we spent over $750,000.00 on engineering. We returned from Malaysia, completed the development of the product, introduced it at a trade show, with worldwide attention later in May of 1996. Thousands of people saw it demonstrated. Even our competitors came to us quietly to see if they could get licenses. It's still state of the art. And two years later, I allege, it's leading edge technology in fingerprint comparison. It can be put on the table here at any moment and demonstrated. The SEC saw it demonstrated repeatedly."[Docket No. 14].

The Ninth Circuit's opinion in United Commercial Ins. V. Pavmaster Corp., 962 F.2d 853 (9th Cir. 1992) clearly requires the reversal of such challenged portions of the disgorgement orders: "Where factual questions not readily ascertainable from the declaration of witnesses or questions of credibility predominate, the district court should hear oral testimony." United Commercial, 962 F.2d at 858. The District Court's decision instead predicated its disgorgement orders entirely on the Churchill hearsay statement was clear unequivocal error mandating reversal. Since the District Court's actions constituted plain error, even any failures to make formal objections below become irrelevant. See United States v.

Turman, 122 F.3d 1167, 1170 (9th Cir. 1997); Hutchinson v. Groskin, 927 F.2d 722, 725 (2nd Cir. 1991).

Although not a salary disgorgement case, in S.E.C. v. Hughes Capital Corporation, 917 F.Supp. 1080 (D.N.J. 1996), the court emphasized that disgorgement must not be used punitively and that such an order is necessarily restricted to identifiable property causally related to the wrongdoing. Id., at 1085. When he consented to the entry of the judgments of permanent injunction and other relief, Rogers agreed that if the parties could not agree upon appropriate disgorgement, that issue would be determined by the District Court upon motion in accordance with the Local Rules, including Local Central District of California Civil Rule 7.5.2, which provides in pertinent part:

> Factual contentions involved in any motion and opposition to motions shall be presented, heard, and determined upon declarations and other written evidence (including documents, photographs, deposition excerpts, etc.) alone, except that the Court may, in its discretion, require or allow oral examination of any declarant or any other witness.

Previously, at the June 29, 1998, hearing on the SEC's second motion for disgorgement [Excerpts of Record Document Number 19, Reporter's Transcript of Proceedings] the District Court was informed by Petitioner Rogers that it was unfair to rely on Churchill's Statement, alone("...the only evidence presented by the SEC to show that Comparator was engaged in no legitimate business activity was the private and uncontested statement of Kay Churchill.") However, the Court of Appeals found his protests untimely. While Rule 43(e) provides that when a motion is based on facts not appearing in the record the

court may hear the matter on affidavits presented by the parties, Ms. Churchill submitted no declaration or affadavit..

The Court of Appeals reviewed the District Court's Order of disgorgement on an abuse of discretion standard. S.E.C. v. First Pacific Bancorp, 142 F.3d 1186, 1190 (9th Cir. 1998), petition for cert. filed (U.S. Oct. 20, 1998)(No, 98-655). The district court's decision to admit evidence was reviewed for an abuse of discretion, and would not reverse an evidentiary determination absent prejudice. Mitchell v. Dupnik, 75 F.3d 517, 527 (9th Cir. 1996); Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1446 (9th Cir. 1994). Finally, the denial of a motion for reconsideration was reviewed for an abuse of discretion. School Dist. No. 1J. Multnomah County v. AC and S, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Petitioner asserts that such evidentiary matters resulting in a disgorgement of salary require a de novo review.

B. The Ninth Circuit Court of Appeals Decision Regarding Disgorgement Conflicts With Other Circuits' Interpretation and Confuses Holdings in District Courts

The Court of Appeals cited Hately v. S.E.C. 8 F3d 653 (9th Cir. 1993) in support of its decision affirming the lower Court. Actually, that case illustrates both the fact that the compensation disgorgement issue is unsettled and that the District Court failed to assess competent evidence in its analysis:

> "While we know of no case going so far as to require disgorgement of compensation to corporate officers and directors, neither have we found any case in which the facts revealed such compensation to be the result of fraud violating the securities law as directly as those alleged here. As the facts are alleged, the excesses in

compensation sought by plaintiff seem indeed to have "flowed" from the wrong. We are unable, consequently, to say at this point that none of the compensation was part of defendant's wrongful gain. ...We are ill equipped without knowledge of the circumstances in this case to determine what is equitable under them, and therefore we must reserve judgment until trial as to the proper relief. Footnote 5: Defendants have also asserted that this disgorgement would be a penalty rather than restitution for a wrong. *See SEC v. Texas Gulf Sulphur Co.*, 445 F.2d at 1208. We consider the distinction to turn on the circumstances surrounding the violation, and we are unable to say at this time disgorgement would be a penalty." Hately v. S.E.C. 8 F,3d 653 (9th Cir. 1993) at p. 655.

Appellate Courts are required to overturn an SEC sanctions order if it is either unwarranted in law or without justification in fact. Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983) (*per curiam*). A court must reduce an SEC sanction where its severity is not justified by the evidence or under the circumstances. *See* Arthur Lipper Corp. v. SEC, 547 F. 2d 171, 183-85 (2d Cir. 1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 719, 54 L.Ed.2d 762 (1978); Beck v. SEC. 430 F.2d 673, 674-76 (6th Cir. 1970).

The Court in Hately v. S.E.C. observed:

"The only question we need answer is whether it was error to base disgorgement upon the total amount of commissions that were generated in connection with Hold's solicitations instead of upon the amount of commissions that Cambridge actually retained.

> The purpose of disgorgement is to deprive a person of "ill-gotten gains" and prevent unjust enrichment. SEC v. Wang 944 F.2d 80, at 85 (2d Cir. 1991). There is no question that approximately $55,000 in commissions were generated as a result of Hold's unlawful solicitations for Cambridge. However, as the SEC concedes, petitioners actually *retained* only $5,062.50 as a result of their improper arrangement with Hold."

Once disgorgement is selected as the method of sanction, the amount must be reasonable, *i.e.* approximately equal to the unjust enrichment. In SEC v. Washington County Utility Dist. 676 F.2d 218, 227 n. 20 (6th Cir. 1982), the defendant received one-half of improperly obtained fees and thus disgorgement should be ordered in that amount, rather than the total as urged by the SEC. The amount is not reasonable here and the lower court articulated no factual analysis that the compensation "flowed from the wrongdoing" as it is required to do.

C. The Question Presented Is Important

The imposition of a sanction such as disgorgement is a most serious matter and has been considered as such for hundreds of years. It must be fair and fairly arrived at. The Magna Carta required that fines should be proportioned to the offense and that "they should not deprive a wrongdoer of his livelihood:

> 'A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.' Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)". U.S. v. Bajakajian 118 S. Ct. 2028, 2037 (1998)

The District Court salary/compensation Disgorgement Order imposed against Petitioner was based solely upon an unsigned statement of an unfaithful employee/SEC informant, previously terminated for embezzlement, regarding the company's "legitimate" business. Petitioner claims here that the Order, and the manner in which it was arrived at, conflicts with the Eighth Amendment.

This Court has stated that the Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." Browning-Ferris Industries of Vt., Inc. v. Ketco Disposal, Inc., 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989). The Excessive Fines Clause thus "limits the government's power to extract payments,

> whether in cash or in kind, 'as punishment for some offense.'" Austin v. United States, 509 U.S. 602, 609-610, 113 S.Ct. 2801, 2805, 125 L.Ed.2d 488 (1993) (emphasis deleted). Forfeitures – payments in kind – are thus "fines" if they constitute punishment for an offense." U.S. v. Bajakajian 118 S. Ct. 2028, 2033 (1998)

The uncertainty surrounding the definition and interpretation of what constitutes disgorgement requires a definitive review by this Court. Further, the increasing and prevalent use of disgorgement in lieu of fines by the SEC deserves review, if for no other reason than to promote uniformity in application by the District Courts.

As set out in Section I C above, fluctuating stock prices resulted in injunctive proceedings in which the company emerged without monetary sanctions whatsoever while the Chairman is subjected to the imposition of a disgorgement order requiring him to pay back salary rightfully earned over the years based upon an unsworn statement accepted as fact without any opportunity to cross examine or confront.

Finally, the evidentiary standards to be applied when carrying out the legal and factual analyses in conformity with the opinions of the Ninth and other Circuits require that a disgorgement order be reasonable and equal to "only the proven unjust enrichment flowing from the wrongdoing" [Hateley v. S.E.C., 8 F. 3d 653, 656 (9th Cir. 1993)], ought to be definitively addressed.

CONCLUSION

Because of the uncertainty attendant to the fair application of the law and lack of uniformity with respect to the evidentiary standards regarding the proper imposition of disgorgement, this petition should be granted allowing for the filing of a written brief.

Date: November 15, 2000

/s/

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Petitioner, Pro Se

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 18 2000

CATHY A CATTERSON
CLERK, U.S. COURT OF
APPEALS

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, v.	:	Nos. 98-56339, 98-56341, 96-56342 DC No. CV 96-3856 LGB
ROBERT REED ROGERS, Defendant-Appellant, and COMPARATOR SYSTEMS CORPORATION; ARMIJO ROBERT REED ROGERS; SCOTT HITT; GREGORY ARMIJO, Defendants.		ORDER No. 98-56347 DC No. CV 96-3856 LGB
SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, v. COMPARATOR SYSTEMS		

Before: FERNANDEZ, TASHIMA, and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en bane rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en bane are denied.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 18 2000

CATHY A CATTERSON
CLERK, U.S. COURT
OF APPEALS

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,	:	Nos. 98-56339, 98-56341, 96-56342
v.	:	DC No. CV 96-3856 LGB
ROBERT REED ROGERS, Defendant-Appellant,	:	MEMORANDUM
and		
COMPARATOR SYSTEMS CORPORATION; ARMIJO ROBERT REED ROGERS; SCOTT HITT; GREGORY ARMIJO, Defendants.		
SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,		
v. COMPARATOR SYSTEMS		

This disposition is not suitable for publication and may not be cited to or by the courts in this circuit, except as provided by Ninth Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding
Argued and Submitted March 6, 2000
Pasadena, California

Before: FERNANDEZ, TASHIMA, and SILVERMAN, Circuit Judges.

Robert Reed Rogers and Gregory Armijo, formerly of officers of Comparator Systems Corporation ("Comparator"), appeal the district court's original order and subsequent order denying reconsideration, requiring them to disjorge profits derived from violations of federal securities laws, in an action brought by the Securities and Exchange Commission ("SEC") alleging that Rogers and Armijo made materially false and misleading statements to investors and prospective investors regarding Comparator's technology.[1] The district court had jurusdiction pursuant to 15 U.S.C. §§ 77v(a), 78u(e), and 78aa, and 28 U.S.C. §§ 1331, 1337, and 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291 and now affirm.

We review the district court's order of disgorgement for an abuse of discretion. See SEC v. First Pacific Bancorp. 142 F.3d 1186, 1190 (9th Cir. 1998), cert. denied, 525 U.S. 1121 (1999). Evidentiary rulings are reviewed for an abuse of discretion. See Gilbrook v. City of Westminster, 177 F.3d 839,

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[1]Four cases have been consolidated on appeal. No. 98-56335 is an appeal by Rogers of both orders. No. 98-56341 is an appeal by Rogers of the denial of the motion for reconsideration. No. 98-56342 is an appeal by Rogers of the original order No. 98-56347 is an appeal by Armijo of the original order. Thus, the notices of appeal filed by Rogers in Nos. 9956341 and 98-56342 are duplicative of the notice of appeal in No. 98-56331), We therefore dismiss the appeals in Nos. 98-56341 and 98-56342.

858 (9th Cir. 1999). We review the denial of a motion for reconsideration for abuse of discretion. See School Dist. No. 1J, v. ACandS, Inc., 5 F.3d 1255, 1262 (9ti Cir. 1993).

First, we find that Rogers and Armijo are estopped from denying that Comparator was not engaged in substantial business activities. In particular, the plain-language of the consents of judgment entered into by both Rogers and Armijo state in relevant part that they each "agree[] to comply with ... 17 C.F.R. § 202.5(e) [and] not to take any action ... denying. . . any allegation in the Complaint." See 17 C.F.R. § 202.5(e) (stating that the Commission's "policy [is] not to permit a defendant ... to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint").

Second, the district court did not err in considering the alleged hearsay statements that Kay Churchill, a former Comparator employee, made to the SEC.[2] The question boils down to whether, under Central District of California Local Rule 7.5.3, which the parties agreed would govern this case, Churchill's statement constituted the equivalent of a declaration or affidavit consistent with the requirements of Federal Rule of Civil Procedure 56(e). The statement offered by the SEC was in transcript form containing Churchill's sworn oral responses to questions by the SEC. As such, it was sufficient to be considered an affidivit. See Curnow v. Ridgecrest Police, 952 F.2d 321, 323-24 (9th Cir. 1991). There was no plain error.

Appellants next argue that the disgorgement order should not apply to compensation. The "purpose of

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[2]Appellants failed to object to this evidence or raise arguments concerning such below. Where the appellants do not object to the admission of evidence of the district court, we review the evidentiary rulings for plain err or. See McClaran v. Plastic Indus. 97F.3d 347,357, n.9 (applying plain error standard in civil case where counsel failed to object below).

disgorgement is to deprive a person of ill-gotten gains and prevent unjust enrichment." Hately v. SEC, 8 F.3(1653, 655 (9th Cir. 1993) (internal quotation marks and citations omitted). To Cie extent that compensation flows from ill-gotten gains, the offending parties should be required to disgorge such to prevent unjust enrichment. See SEC v. Penn Central Co., 450 F. Supp. 908, 916-17 (E.D. Pa. 1978). Here, because the district court did not err in finding that Comparator did not engage in substantial business activities, the district court did not abuse its discretion in finding that appellants' compensation should be disgorged.

Finally, the district court correctly denied the motion reconsideration, because it committed no clear error in the original ruling and the newly presented evidence could reasonably have been presented earlier. See School Dist. No. 1J, 5 F.3d at 1263.

The judgment of the district court is AFFIRMED in No. 98-56339 and No. 98-56347. The appeals are DISMISSED in No. 98-56341 and No. 98-56342.

APPENDIX C

Christian J. Mixter
Karen M. Mincavage

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FILED
CLERK, U.S. DISTRICT
COURT

AUG 13, 1998

CENTRAL DISTRICT OF
CALIFORNIA
BY DEPUTY

Local Counsel:

Karen L. Matteson
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Los Angeles, CA 90036-3648
Telephone: (213) 965-3840

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. COMPARATOR SYSTEMS CORPORATION; ROBERT REED ROGERS; SCOTT HITT; and GREGORY ARMIJO, Defendants.	:	Civil Action No. 96-3856 (LGB) (JGx) AMENDED SUPPLEMENTAL JUDGMENT REGARDING DISGORGEMENT AS TO DEFENDANT ROBERT REED ROGERS

Paragraphs VIII and IX of the Judgment of Permanent Injunction and Other Relief Against Defendant Robert Reed Rogers, entered on September 18, 1996 (the "September 18, 1996 Judgment") having reserved for later determination the issues of disgorgement and penalties as to Defendant Rogers; and the Court having issued an Order Granting in Part and Denying in Part Plaintiff's Motions for Orders Fixing Disgorgement and Granting Motion for Default Judgment, entered on May 18, 1998, as well as an Order Granting SEC's Motion to Amend Order, entered on July 8, 1998, and having considered all of the pleadings and proceedings before it, the Court being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Robert Reed Rogers shall pay disgorgement in the total amount of $297,496.67, consisting of: (1) $263,106 in salary from Comparator; (2) $4,469.50 in profits on the sale of Comparator stock by Talisman; and (3) $29,921.17 in pre-judgment interest. 4ithin 30 days of the entry of this Amended Supplemental Judgment, Defendant Rogers shall pay this amount by cashier's ,heck made payable to the Clerk, U.S. District Court. The :ashier's check shall indicate the caption and civil action number for this case. The Clerk of Court shall retain the payment in an interest-bearing account pursuant to Fed. R. Civ. P. 67 and Local Rule 22. Defendant Rogers shall simultaneously transmit a copy of the cashier's check to Christian J. Mixter, Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 8-1, Washington, D.C., 20549. The Commission shall cause a copy of his Amended Supplemental Judgment to be personally served upon he Clerk of the Court, or the Chief Deputy Clerk, pursuant to Local Rule 22.2.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers shall disgorge 30,536,575 shares of Comparator Systems Corporation ("Comparator") common stock, and shall convey the disgorged stock to Comparator. Within 30 days of the entry of his Amended Supplemental Judgment, Defendant Rogers shall provide Comparator, with copies simultaneously transmitted to Christian J. Mixter at the address above, with stock certificates and a written document that irrevocably transfers to Comparator the foregoing Comparator stock.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers shall disavow all debts owed to him by Comparator and incurred prior to July 1, 1996, excepting from this judgment, $322,374 of debt incurred prior to July 1, 1993 (plus $3950.42 of interest accrued thereupon), totaling $326,324.42. Within 30 days of the entry of this Amended Supplemental Judgment, Defendant Rogers shall provide Comparator, with a copy simultaneously transmitted to counsel for the Commission in this action, with a written document that irrevocably renounces all such debts.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in view of the Commission's withdrawal of its prayers for penalties as to Defendant Rogers pursuant to Section 20(d) of the Securities Act of 1933, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 5 78u(d)(3), those prayers are hereby dismissed.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in order to facilitate satisfaction of Paragraphs I-II above, Paragraph VII of the September 18, 1996 Judgment freezing Rogers's assets is hereby vacated. Except as expressly modified herein, the September 18, 1996 Judgment shall continue in full force and effect.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this action for the purpose of implementing and enforcing the terms and conditions of this Amended Supplemental Judgment and for all other purposes.

VII.

There being no just cause for delay, the Clerk of the Court is directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Amended Supplemental Judgment forthwith and without further notice.

DATED: AUG 11 1998

s/
Lourdes G. Baird
United States District Judge

APPENDIX D

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FILED
CLERK, U.S. DISTRICT
COURT

SEP 17, 1996

CENTRAL DISTRICT OF
CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	:	Civil Action No. 96-3856 (LGB) (JGx)
v.	:	JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AGAINST DEFENDANT ROBERT REED ROGERS
COMPARATOR SYSTEMS CORPORATION; ROBERT REED ROGERS; SCOTT HITT; and GREGORY ARMIJO, Defendants.		

Plaintiff Securities and Exchange Commission (the "Commission") having filed a Complaint in the above-captioned action; and Defendant Robert Reed Rogers having entered into the attached Consent and Undertakings ("Consent"), which is hereby incorporated by reference as if fully set forth herein, and having entered a general appearance and having waived the entry of findings of fact and conclusions of law under Federal Rule of Civil Procedure S2, and without admitting or denying any of the allegations of the Complaint, except as to jurisdiction, which is admitted, and having consented to entry of this Judgment of Permanent Injunction and Other Relief ("Judgment"); and it appearing that this Court has jurisdiction over Defendant Rogers and the subject matter hereof, and the Court being fully advised in the premises:

I.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Rogers, his agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with any of them, who receive actual notice of this Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in the offer or sale of the securities of any issuer, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails:

A. employing any device, scheme or artifice to defraud;

B. obtaining money or property by means of any untrue statement of a material fact or any

omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser;

in violation of Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. 77q(a)].

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers, his agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with any of them, who receive actual notice of this Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of the securities of any issuer, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

A. employing any device, scheme or artifice to defraud;

B. making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any act, practice, or course of business which operates or would operate as

a fraud or deceit upon any person, in connection with the purchase or sale of any security;

in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b) and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-S)

III.

IT IS FURTHER ORDERED., ADJUDGED AND DECREED that Defendant Rogers, his agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with any of them, who receive actual notice of this Judgment, by personal 3ervice or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Sections 13 (a) and 13 (b) (2) (A) and (B) of the Exchange Act [15 U.S. C. §§ 78m(a) and 78m(b)(2)(A) and (B)] and Rules 13a-1, 13a-13, and 12b-20 (17 Z.F.R. H 240.13a-1, 240.13a-13, and 240.12b-20] promulgated thereunder by directly or indirectly:

a. filing or causing to be filed with the Commission any report required to be filed with the Commission pursuant to Section 13 (a) of the Exchange Act [15 U.S.C. § 78m(a)] and the rules and regulations promulgated thereunder, which contains any untrue statement of material fact, which omits to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or which omits to disclose any information required to be disclosed; or

b. failing to

(i) make and keep accurate books, records and accounts, which, in reasonable detail, accurately and fairly reflect the

transactions and dispositions of the assets of the issuer; or

(ii) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: transactions are executed in accordance with management's general or specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets; access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared-with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers, his agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with any of them, who receive actual notice of this Judgment by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Section 13(b) (5) of the Exchange Act [15 U.S.C. §78m(b) (5)] and Rule 13b2-1 [17 C.F.R. §240.13b2-11 by

a. knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly-falsifying any book, record, or

account described in Section 13(b)(2) of the Exchange Act; or

b. directly or indirectly falsifying or causing to be falsified any book, record or account subject to Section 13 (b) (2) (A) of the Exchange Act.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers be and hereby is permanently prohibited f rom acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act (15 U.S.C. 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers and his agents, servants, employees and attorneys-in-fact, and those persons in active concert or participation with any of them, who receive actual notice of this Judgment, by personal service or otherwise, and each of them, are prohibited from transferring, altering, or otherwise disposing of, or concealing, in any manner, any books, records, computer programs, computer files, computer printouts, correspondence, memoranda, brochures, or any other documents of any kind, which relate to, pertain to, or contain evidence of matters relevant to t he subject matter of the Complaint, in whatever form such materials may presently and wherever located.

VII.

IT IS FURTHER ORDERED that, pending the determination of disgorgement and penalties provided for in Paragraphs VIII and IX below, and except as otherwise ordered by this Court, all monies and assets in all accounts at any bank, financial institution or brokerage firm, all certificates of deposit, and other funds or assets, held in the name of, for the benefit of, or over which account authority is held by Defendant Rogers, or any person or entity affiliated with him are frozen, except that the following accounts shall not be frozen:

a. Comparator Systems Corp., Bank of America Account No. 11017-07633;

b. Gregory A. Armijo d/b/a Comparator Systems, Bank of America Account No. 11014-05362;

c. Gregory A. Armijo, d/b/a Comparator Systems, Bank of America Account No. 11011-06443; and

d. Comparator Systems Corp., El Dorado Bank Account No. 351-026-995.

e. Robert Reed Rogers, Bank of America Account No. 2439832078.

Until further Order of this Court, Defendant Rogers shall make no withdrawal from his personal account, except that Defendant Rogers shall be permitted an allowance of $5,415 per month for necessary and reasonable living expenses, to be drawn from Account No. 24398-32078 at the Bank of America, provided that defendant Rogers will furnish the staff of the Commission with copies of bank statements for that account and with a

weekly written statement bearing his signature describing all activity in that account.

VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Dgers shall pay disgorgement, including prejudgment interest thereon, in an amount and upon such terms as may be determined by agreement of the parties or by the Court upon motion brought on the Commission pursuant to the Local Rules of this Court. Defendant Rogers shall not, in response to any such motion, raise a defense that he is not liable for such disgorgement because did not violate one or more of the provisions of the Securities Act, the Exchange Act, or the rules thereunder set forth in this Judgment.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant
Rogers shall be ordered to pay civil penalties in an amount and upon such terms as may be determined by agreement of the parties
or by the Court upon motion brought on by the Commission pursuant
to the Local Rules of this Court. Defendant Rogers shall not, in response to any such motion, raise as a defense that he is not liable for such civil penalties because he did not violate one or more of the provisions of the Securities Act, the Exchange Act, or the rules thereunder set forth in this Judgment.

X.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Rogers's Consent, which is attached hereto, be, and the same hereby is, incorporated herein with the same force and effect as if fully set forth herein.

XI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this action for the purpose of implementing and enforcing the terms and conditions of this judgment and for all other purposes.

XII.

There being no just cause for delay, the Clerk of the Court is directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Judgment forthwith and without further notice.

DATED: September 16, 1996

s/
Lourdes G. Baird
United States District Judge

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Robert Reed Rogers, *Petitioner*,
v.
Securities and Exchange Commission, *Respondent*.

Petition for a Writ of Certiorari From the
United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

I, Robert Reed Rogers, Pro Se, certify and declare under penalty of perjury, under the laws of the United States of America, that on this 17th day of January, 2001, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed by me, first class postage prepaid, to: Harvey J. Goldschmid, General Counsel, Jacob H. Stillman, Associate General Counsel, Randall W. Quinn, Assistant General Counsel, and John Avery, Senior Counsel, Securities and Exchange Commission, 450 Fifth Street, N. W., Washington D.C. 20549, counsel for the respondent herein, and, to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001.

/s/

Robert Reed Rogers
5001 Birch Street
Newport Beach
CA 92660
Petitioner, Pro Se